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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN JOSE DIVISION
20

21 GIRAFA.COM, INC.,

22 Plaintiff,

23 v.

24 ALEXA INTERNET, INC.; NIALL
O'DRISCOLL,

25 Defendants.
26
27
28

CASE NO. CV 08-02745 RMW

**REPLY IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S
THIRD CLAIM FOR RELIEF UNDER
FED. R. CIV. P. 12(b)(6)**

Date: September 5, 2008
Time: 9:00 am
Dept: 6, 4th Floor
Judge: Ronald M. Whyte

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1 **I. INTRODUCTION.**

2 In a ten-page opposition brief, plaintiff Girafa spends only about half a page addressing
 3 the central and dispositive issue in Defendants’ Motion to Dismiss. Specifically, Girafa cannot
 4 state a claim under California’s Unfair Competition Law (the “UCL”), Cal. Bus. & Prof. Code
 5 §17200, *et. seq.*, based on the filing and prosecution of another lawsuit that is still pending.
 6 Indeed, any such California claim—no matter how the claim is captioned—must meet the
 7 requirements of a malicious prosecution action: (1) the underlying suit must have lacked probable
 8 cause; **and** (2) it must have terminated in favor of the party asserting a claim based on the
 9 underlying suit. Because Girafa’s third claim for relief is based on defendant Alexa’s filing and
 10 prosecution of a still-pending patent infringement suit in Texas (the “Texas Action”), Girafa has
 11 no claim for relief. Understandably so as all Alexa has done is file a patent lawsuit against Girafa
 12 in order to protect its intellectual property from further infringement. There is nothing illicit or
 13 “sham” about this scenario, but rather, it is extremely common in intellectual property disputes
 14 for each party to seek to protect its intellectual property rights.

15 Although this is the first and central issue raised in Defendants’ Motion to Dismiss, Girafa
 16 buries its short response on pages eight and nine of its opposition. (Opp. to 12(b)(6) at pp. 8:18-
 17 9:9). The reason for this is plain—Girafa has no real argument. Girafa asserts that because it
 18 alleges the Texas Action is a “sham,” it can state a cause of action now instead of waiting for
 19 resolution of the Texas Action. This argument runs directly afoul of the California Supreme
 20 Court’s holding that even where it is alleged that the “[underlying] litigation was brought without
 21 probable cause,” no claim can be stated unless “the [underlying] litigation concluded in plaintiff’s
 22 favor.” *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1137 (1990) (“*PG&E*”).
 23 The fact that Girafa asserts statutory UCL claims rather than common-law claims makes no
 24 difference. The California Court of Appeal has applied *PG&E* to unfair competition claims,
 25 stating that it controls regardless of the label given to the claims. *Ludwig v. Superior Court*, 37
 26 Cal.App.4th 8, 25 (1995).

27 This is not to say that Girafa’s other arguments have merit. To the contrary, Girafa’s
 28 factual allegations do not meet the substantive requirements for claims under the UCL. Even if

1 true, the allegations do not constitute “unlawful, unfair, or fraudulent” business practices.
 2 Moreover, Girafa has not alleged any facts to support individual liability on the part of Alexa’s
 3 CEO, Niall O’Driscoll.

4 But the Court need not reach these points. Girafa cannot overcome the threshold barrier
 5 to its UCL claim. The Texas Action is still pending, and so Girafa has no claim under California
 6 law based on the filing and prosecution of that action.

7 **II. LEGAL ARGUMENT.**

8 **A. The California Supreme Court’s Holding in *PG&E* Precludes Girafa From** 9 **Basing a UCL Claim on the Filing and Prosecution of the Pending Texas** 10 **Action.**

11 As discussed in Defendants’ moving papers, the California Supreme Court has held that a
 12 plaintiff cannot assert claims based on the filing and prosecution of a lawsuit until termination of
 13 that underlying suit. In *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1124
 14 (1990) (“*PG&E*”), the Court cited California’s strong public policy in favor of providing access
 15 to the courts, and reasoned that allowing tort claims based on pending litigation would
 16 impermissibly burden the right to petition for redress. *Id.* at 1131, 1137. Also as discussed in
 17 Defendants’ moving papers, judges of this Court have followed and relied on *PG&E* to dismiss
 18 interference claims based on the filing and prosecution of still-pending trademark and patent
 19 infringement suits. *See, e.g., Formula One Licensing, B.V. v. Purple Interactive Ltd.*, No. C 00-
 20 2222 MMC, 2001 U.S. Dist. LEXIS 2968 (N.D. Cal. 2001) (dismissing interference claims based
 21 on pending trademark infringement suit); *Visto Corp. v. Sproqit Techs., Inc.*, 360 F. Supp. 2d
 22 1064, 1065, 1072 (N.D. Cal. 2005) (dismissing interference claims based on pending patent
 23 infringement suit).

24 The California Supreme Court’s decision in *PG&E* is dispositive here. Like the claims at
 25 issue in *PG&E*, *Formula One*, and *Visto Corp.*, Girafa’s UCL claim attempts to impose liability
 26 for the filing and prosecution of a still-pending lawsuit. And like the claims in those cases,
 27 Girafa’s UCL claim is premature—Girafa has no possible claim for relief unless and until the
 28 Texas Action terminates in its favor.

1 **1. There is No Exception to *PG&E* for “Sham Litigation”.**

2 In an attempt to escape the holding of *PG&E*, Girafa argues that there is an exception to
3 its holding in the case of “sham litigation.” Girafa cites the fact that “sham litigation” creates an
4 exception to the *Noerr-Pennington* antitrust doctrine, and argues that *PG&E* “explicitly
5 recognized the *Noerr-Pennington* doctrine exception for ‘sham petitions, brought without
6 probable cause for the purpose of harassment.’” (Opp. to 12(b)(6) at pp. 8:18-9:9.) Girafa then
7 reasons that its UCL claim “is fully cognizable” because it is based on allegations that the Texas
8 Action is “bad faith sham litigation.” (Opp. to 12(b)(6) at p. 9:3-4.)

9 Girafa’s argument is based on a gross misreading of *PG&E*. There is no exception to its
10 holding based on “sham litigation.” To the contrary, the idea of “sham litigation” is already
11 incorporated in the first part of the *PG&E* test—lack of probable cause in the underlying suit.
12 The *PG&E* Court stated that there is an exception to the *Noerr-Pennington* doctrine for “sham”
13 litigation, but it did so in the context of developing its own test. The Court noted that the policies
14 underlying *Noerr-Pennington* had been applied to determine “the reach of the cause of action for
15 malicious prosecution.” *PG&E*, 50 Cal. 3d at 1135. Thus, the *PG&E* decision discusses the
16 “sham” exception to *Noerr-Pennington* as analogous to the first requirement for a malicious
17 prosecution claim—i.e., that the underlying claim must have been brought in bad faith. *See id.* at
18 1135-37.

19 However, as the *PG&E* Court discussed, there is a temporal limitation on claims for
20 malicious prosecution (and therefore to other claims seeking to impose liability for the filing and
21 prosecution of a lawsuit) that goes above and beyond the “sham” exception to *Noerr-Pennington*.
22 Specifically, in order to state a claim for relief, a plaintiff cannot simply allege that “the
23 [underlying] litigation was brought without probable cause,” but must also allege “that the
24 [underlying] litigation concluded in plaintiff’s favor.” *PG&E*, 50 Cal. 3d at 1137.

25 In its opposition, Girafa cites *Monolithic Power Systems, Inc. v. O2 Micro Int’l Ltd.* 2007
26 U.S. Dist. LEXIS 22556 (N.D. Cal. 2007), as support for the proposition that “Girafa’s unfair
27 competition claim based on that bad faith sham litigation [the Texas Action] is fully cognizable.”
28 (Opp. to 12(b)(6) at p. 9:3-7.) This citation is completely inapposite. *Monolithic Power Systems*

1 does not cite *PG&E* or discuss the issue currently before this Court—i.e., whether Girafa can
 2 state a claim based on the filing and prosecution of a lawsuit when that other lawsuit is still
 3 pending. The fact that the defendant in *Monolithic Power Systems* failed to raise the issue is
 4 certainly not binding on Defendants here.

5 Again, *PG&E* holds that in order to state claim for relief based on the filing and
 6 prosecution of a lawsuit, a plaintiff cannot simply allege that “the litigation was brought without
 7 probable cause,” but must also allege “that the [underlying] litigation concluded in plaintiff’s
 8 favor.” *PG&E*, 50 Cal. 3d at 1137. Girafa cannot satisfy this second requirement while the
 9 underlying Texas Action is still pending, and its UCL claim must therefore be dismissed.

10 **2. UCL Claims Are Not Excepted from the Holding of *PG&E*.**

11 Girafa attempts to distinguish *Visto Corp.* and *Formula One*—cases in which this Court
 12 followed and relied on *PG&E*—because they concerned common-law tort claims rather than
 13 statutory UCL claims. (Opp. to 12(b)(6) at p. 9 n. 6.) Girafa argues in a footnote that
 14 “Defendants have cited no case applying *Pacific Gas and Electric* to bar an unfair competition
 15 claim premised on bad faith sham litigation.” (Opp. to 12(b)(6) at p. 9 n. 6.)

16 Girafa’s argument turns on a distinction without a difference. The California courts have
 17 made abundantly clear that statutory UCL claims are not privileged or preferred over common-
 18 law claims. Where UCL claims threaten protected rights, the California courts will dismiss them
 19 on the same grounds as a common-law tort claim. Moreover, the California Court of Appeal has
 20 in fact applied *PG&E* to bar unfair competition claims premised on bad faith sham litigation

21 In *Rubin v. Green*, 4 Cal. 4th 1187 (1993), the California Supreme Court held that UCL
 22 claims are subject to California’s litigation privilege. In so ruling, the Court reasoned that “the
 23 policy of free access to the courts underlying the [litigation] privilege [is] ‘equally compelling in
 24 the context of common law and statutory claims ... there is no valid basis for distinguishing
 25 between the two.’” *Id.* at 1202 (quoting *Ribas v. Clark*, 38 Cal.3d 355, 364 (1985)). The Court
 26 concluded that the protections of the litigation privilege “should not evaporate merely because the
 27 plaintiff discovers a conveniently different label for pleading what is in substance an identical
 28 grievance arising from identical conduct.” *Id.* at 1203. The same rationale applies here. Girafa

1 cannot place a UCL label on its claim in order to bypass *PG&E*.

2 Girafa does cite one case in support of the argument that Girafa attempts to make in its
3 opposition. In *Allergan Sales, Inc. v. Pharmacia & Upjohn Inc.*, 1997 U.S. Dist. LEXIS 7648 at
4 *9 (S.D. Cal. 1997), the United States District Court for the Southern District of California
5 declined to apply *PG&E* to dismiss a UCL claim based on the filing and prosecution of another
6 pending action. In so doing, the court stated that “Pacific Gas, however, did not address whether
7 statutory claims under California’s antitrust Cartwright Act and the Unfair Competition Act may
8 only be brought after resolution in the claimant’s favor in the underlying action.”

9 With all due respect, the *Allergan* case was incorrectly decided. As discussed previously,
10 the California Supreme Court has held that the policy of providing free access to the courts—the
11 policy underlying *PG&E*—is “equally compelling in the context of common law and statutory
12 claims.” *Rubin*, 4 Cal. 4th at 1202. Just as important, the California Court of Appeal has held
13 that *PG&E* applies to any and all claims based on the filing and prosecution of a lawsuit.

14 In *Ludwig v. Superior Court*, 37 Cal.App.4th 8, 12 (1995), the plaintiff asserted claims for
15 interference with contractual relations and prospective economic advantage—and unfair
16 competition—based on a number of alleged misdeeds, including the filing and prosecution of an
17 allegedly “meritless” lawsuit. The defendant in *Ludwig* brought a special motion to strike under
18 California’s anti-SLAPP statute, and petitioned for a writ of mandate when the motion was
19 denied. *Id.* at 11-12. The Court of Appeal granted defendant’s petition, and in so doing, held that
20 *PG&E* applied regardless of how the causes of action were characterized:

21 Although the [*PG&E*] court did not hold that the plaintiff’s only
22 remedy against the defendant was a cause of action for malicious
23 prosecution, it did hold that the plaintiff’s claims against the
24 defendant must be measured by the standards applicable to a
25 malicious prosecution action. That is, the plaintiff “must allege that
the litigation was brought without probable cause and that the
litigation concluded in plaintiff’s favor.” Thus, for Barstow to
prevail it was essential that it provide a *prima facie* case on these
points **no matter how it chose to label its claims.**

26 *Id.* at 25 (emphasis added; internal citations omitted; quoting *PG&E*, 50 Cal.3d at 1137). Like
27 the unfair competition claims in *Ludwig*, Girafa’s UCL claim is subject to the holding of *PG&E*.
28 In order to state a claim, Girafa must allege that the Texas Action concluded in its favor—

1 something it cannot do while that case is still pending.

2 In sum, Girafa cannot use California law to collaterally attack, burden, and undermine
3 pending litigation. Girafa's UCL claim must be dismissed.

4 **B. Girafa Has Not Alleged Substantive Facts to Support Its UCL Claim.**

5 In addition to being barred by *PG&E*, Girafa's UCL claim is more substantively flawed –
6 it has not alleged the basic factual predicates for “unlawful, unfair and fraudulent” business
7 practices. Cal. Bus. & Prof. Code § 17200.

8 **1. “Unlawful” and “Fraudulent” Business Practices – Girafa Does Not**
9 **Oppose Defendants’ Motion.**

10 In its complaint, Girafa attempts to state claims for relief on all three prongs of the UCL,
11 alleging that “ALEXA and O’DRISCOLL have committed and continue to commit ... unlawful,
12 unfair and fraudulent conduct” (Complaint, ¶ 35.)

13 As discussed in Defendants’ moving papers, Girafa has not stated a claim for “unlawful”
14 business practices because it fails to identify the “statute, regulation or law” which the Defendants
15 allegedly violated. *Bernardo v. Planned Parenthood Fed’n of Am.*, 115 Cal. App. 4th 322, 352
16 (2004). And Girafa has no claim for “fraudulent” business practices because it has not alleged
17 any conduct that would be likely to deceive. *South Bay Chevrolet v. Gen. Motors Acceptance*
18 *Corp.*, 72 Cal. App. 4th 861, 865 (1999).

19 Girafa offers no argument on these points, instead resting on the “unfair” prong of the
20 UCL. (Opp. to 12(b)(6) at p. 4:5-7.) Girafa asserts that it does not “conced[e] that Alexa has not
21 violated the ‘unlawful’ or ‘fraudulent’ competition.” (Opp. to 12(b)(6) at p. 4:5-6.) But because
22 Girafa offers no argument regarding its claims for “unlawful” and “fraudulent” business practices,
23 its claims under these prongs of the UCL should be dismissed.

24 **2. “Unfair” Business Practices – Girafa Fails to Allege Violation of**
25 **Antitrust Law Or Policy.**

26 The parties agree that the California Supreme Court decision in *Cel-Tech Commc’ns, Inc.*
27 *v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999), provides the standard of decision
28 for Girafa’s claim of “unfair” business practices. Following *Cel-Tech*, Girafa’s claim must be

1 based on “conduct that threatens an incipient violation of an antitrust law, or violates the policy or
 2 spirit of one of those laws because its effects are comparable to or the same as a violation of the
 3 law,” or on allegations that “[the conduct] otherwise significantly threatens or harms
 4 competition.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187
 5 (1999). As with the other prongs of the UCL, a plaintiff asserting a claim of “unfair” business
 6 practices must “state with reasonable particularity the facts supporting the statutory elements of
 7 the violation.” *Multimedia Patent Trust*, 525 F. Supp. 2d at 1217 (2007).

8 In its opposition, Girafa relies on *In re Acacia Media Technologies Corp.*, 2005 WL
 9 1683660, 2005 U.S. Dist LEXIS 37009, for the proposition that the bad-faith filing of a patent
 10 infringement suit is “unfair” because it is conduct “threatens an incipient violation of an antitrust
 11 law, or violates the policy or spirit of one of those laws ..., or otherwise significantly threatens or
 12 harms competition.” *Id.* at 2005 WL 1683660 *5.

13 In reaching this holding, *Acacia* relied on the Ninth Circuit case *Handgards, Inc. v.*
 14 *Ethicon, Inc.*, 601 F.2d 986, 993 (9th Cir.1979), which stated:

15 [Patent] infringement actions initiated and conducted in bad faith
 16 contribute nothing to the furtherance of the policies of either the
 17 patent law or the antitrust law. The district court was correct in
 holding, in effect, that such actions may constitute an attempt to
 monopolize violative of Section 2 of the antitrust law.

18 Defendants do not dispute the holdings of either *Acacia* or *Handgards*—but there is a
 19 significant distinction between those cases and the present action. In *Handgards*, the patent
 20 litigation at issue was allegedly part of a scheme to monopolize an entire industry. The plaintiff
 21 alleged that the defendant “attempted to create a monopoly in the disposable glove industry by
 22 accumulating a number of the relevant patents no matter how weak or narrow and then instigating
 23 a series of lawsuits in order to slowly litigate the competition out of business.” *Handgards*, 601
 24 F.2d at 990. Similarly, in *Acacia*, the plaintiff alleged that the defendant had engaged in a pattern
 25 of filing baseless litigation “against Defendant and others in Defendant’s industry.” *Acacia*, 2005
 26 WL 1683660 *5 (emphasis added). This behavior stands in sharp contrast to the facts here, where
 27 Alexa has just filed a patent lawsuit as part of an ongoing business dispute between the
 28 companies and the merits of the case are far from being determined.

Moreover, in contrast, Girafa does not allege any threat to competition in any market or industry. Girafa makes conclusory statements that Alexa and O'Driscoll have engaged in "anticompetitive" conduct, but does not state how the conduct is anticompetitive. (Complaint, ¶ 35.) Girafa does not identify any relevant product or geographic markets, nor does it describe how any competition in such a market might be harmed.

Girafa instead alleges that Alexa initiated the Texas Action in order to retaliate against Girafa for filing an earlier lawsuit in Delaware and to divert Girafa's resources from the Delaware action. Girafa alleges that Alexa filed the Texas Action "to put extreme financial pressure on Girafa to gain improper business and litigation advantages and attempt to force Girafa out of business." (Opp. to 12(b)(6) at p. 7:12-20.)¹

If multiplication of litigation and its attendant costs were really a threat to Girafa's business, it would not have initiated this new suit in California. More important, the fact that Girafa might suffer some harm from the conduct alleged does not mean that antitrust law or policy is implicated. "[T]he antitrust laws are intended to protect the competitive process, not to protect individual competitors." *Lloyd Design Corp. v. Mercedes Benz of North America, Inc.*, 66 Cal.App.4th 716, 724 n. 6 (1998) (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342-345 (1990)). If there is no actual or threatened harm to competition—as opposed to harm to an individual competitor—a practice does not give rise to liability under either antitrust laws or the UCL. *See Chavez v. Whirlpool Corp.*, 93 Cal.App.4th 363, 374 (2001) (upholding dismissal of both antitrust and "unfair" UCL claims based on lack of harm to competition).

In sum, Girafa has not alleged "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws" or "[conduct that] otherwise significantly threatens or harms competition." *Cel-Tech*, 20 Cal. 4th 163, 187 (1999). Girafa has only alleged a threat of harm to itself, and has therefore failed to state a claim for "unfair" business practices.

¹ Girafa also cites *Monolithic Power Systems, Inc. v. O2 Micro Int'l Ltd.* 2007 U.S. Dist. LEXIS 22556 (N.D. Cal. 2007), but admits that the defendant in that case did not dispute the issue of whether bad-faith patent infringement suits constitute "unfair" business practices. (Opp. to 12(b)(6) at p. 6:14-15.) The case therefore has no relevance to the present motion.

1 **C. Girafa Has Not Alleged Facts Sufficient to State a UCL Claim for Relief**
 2 **Against Niall O’Driscoll.**

3 In its opposition, Girafa argues that it can state a claim against Niall O’Driscoll under the
 4 UCL “not ... on any alter ego theory,” but on the basis that “it is well established that an owner or
 5 an officer of a corporation may be individually liable under the UCL if he or she actively and
 6 directly participates in the unfair business practice.” (Opp. to 12(b)(6) at pp. 9:12-13, 9:19-10:2
 7 (quoting *Bradstreet v. Wong*, 161 Cal.App.4th 1440, 1458 (2008).) Girafa argues that because
 8 O’Driscoll is the CEO of Alexa, he “participates in the management of Alexa” and can therefore
 9 be held responsible under the UCL for the corporation’s acts. (Opp. to 12(b)(6) at p. 10:9-10.)

10 Although UCL case law does not apply the same strict requirements as normal alter ego
 11 liability, those cases imposing UCL liability against corporate management do nevertheless
 12 require direct involvement by the individuals charged. Thus, in *People v. Toomey*, 157 Cal. App.
 13 3d 1, 15-16 & n. 5 (1984), the California Court of Appeal held that the owner and managing
 14 principal of a corporation could be held liable under the UCL where he “personally participated in
 15 the misleading advertising” and where he dominated and controlled the company—“Toomey was
 16 in essence, the company.” There are no such allegations against O’Driscoll here.

17 In addition, Girafa’s opposition actually points out another reason why it has no claim
 18 against O’Driscoll. Girafa concedes that “not all of the remedies allowed for violation of § 17200
 19 may be available against the defendant in his individual capacity.” (Opp. to 12(b)(6) at p. 9:18-
 20 19.) This is important because where there is no available UCL remedy, there is no UCL claim
 21 for relief. See *Madrid v. Perot Systems Corp.*, 130 Cal.App.4th 440, 462 (2005) (upholding
 22 dismissal of UCL claim where allegations did not support UCL remedies of restitution or
 23 injunction).

24 The importance of this issue is illustrated by a case Girafa cites. In *Bradstreet v. Wong*,
 25 161 Cal.App.4th 1440, 1458 (2008), the Court of Appeal held that employees who had not been
 26 paid all wages due had no monetary remedy against corporate principals under the UCL because
 27 the corporate principals had not personally received the benefit of the unpaid wages. Similarly,
 28 Girafa has no UCL claim against O’Driscoll because it has no remedy against him.

1 Although Girafa prays for injunctive relief in its complaint, there is no basis for an
 2 injunction against O’Driscoll. Girafa’s UCL claim is based on the filing and prosecution of the
 3 Texas Action—and Girafa admits that defendant Alexa filed that lawsuit, not O’Driscoll.
 4 (Complaint, ¶ 33.) The point is that there is no basis for an injunction as the corporation is the
 5 party to the lawsuit that is allegedly harming Girafa. Even if O’Driscoll “is the Chief Executive
 6 Officer of ALEXA” and he “knowingly encouraged, induced, authorized, aided and abetted the
 7 filing of the Texas action” (Complaint, ¶¶ 3, 33), an injunction against him personally would do
 8 nothing to abate the ongoing Texas Action.

9 Although Girafa argues that Alexa’s Texas Action is “sham litigation,” the real sham
 10 litigation is here. Girafa appears to have included O’Driscoll in this lawsuit for the purely
 11 strategic purpose of supporting its argument that California is the best venue for the parties’
 12 dispute. Girafa has no basis for individual relief against O’Driscoll, and the Court should dismiss
 13 Girafa’s own “sham litigation” against him.

14 **III. CONCLUSION**

15 Girafa cannot assert UCL claims based on alleged bad faith litigation unless and until the
 16 Texas Action is concluded in its favor, and it has not alleged facts supporting claims of
 17 “unlawful, unfair and fraudulent” business practices against either Alexa or O’Driscoll. For the
 18 reasons set forth herein and in Defendants’ moving papers, the Court should dismiss Girafa’s
 19 third claim for relief.

20 Dated: August 22, 2008

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22 By /s/ Elizabeth Day

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24 Attorneys For Defendants
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